A **THE CO-OPERATIVE CENTRAL BANK LTD**

v.

DR S BALAKRISHNAN SHANMUGAM & ANOR; LEDCHUMANAN NAGAPPAN ALIAS ATHMANANTHA SWAMI (THIRD PARTIES)

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL NO: D4-23-308-1987]
C 28 APRIL 2006

CONTRACT: *Loan - Agreement - Defendant agents for loan agreement - Third parties - Third parties not qualified to borrow directly from plaintiff - Whether intention was for defendants to borrow from and repay*
D *plaintiff - Whether defendants as agents liable - Contracts Act 1950, s. 183 - Whether third parties to indemnify defendants - Whether judgment entered for plaintiff*

CIVIL PROCEDURE: *Parties - Third party proceedings - Loan*
E *agreement - Defendants agents for loan agreement - Third parties not qualified to borrow directly from plaintiff - Whether intention was for defendants to borrow from and repay plaintiff - Whether defendants as agents liable - Contracts Act 1950, s. 183 - Whether third parties to indemnify defendants - Whether judgment entered for plaintiff*

F The plaintiff was a co-operative society incorporated under the Co-operative Societies Act 1948 and by a loan agreement ('loan agreement') the plaintiff granted to the defendants a loan of RM500,000 ('loan'). The loan was granted to purchase shares in Ladang Christie Sdn Bhd ('Ladang Christie'). Ladang Christie's
G land ('land') was charged to the plaintiff as security for the loan. The loan was disbursed and Ladang Christie's shares were never transferred to the defendants. The defendants have never made any repayment for the loan. The first third party, through an agent, had applied to the plaintiff for and was granted a second
H loan of RM80,000, part of which was used to repay the outstanding interest on the loan. The defendants brought the third party proceedings claiming an indemnity from the third parties against the whole of the plaintiff's claims and costs of this action. The first third party admitted that the defendants were his agents
I for the loan agreement and had agreed to indemnify the defendants should the defendants be held liable. Leave was given

to the third parties to defend this action jointly with the defendants. The third parties submitted that the plaintiff had admitted at all material times the plaintiff knew that the first third party wanted the loan, and neither third party was entitled to apply for the loan as neither was eligible for membership of the plaintiff. Further, the plaintiff had known that the defendants were borrowing the loan wholly for the use of the first third party. The plaintiff denied that it had represented to the first third party that the defendants would not be liable for the loan and that the first third party would be liable for the loan.

Held (judgment entered for the plaintiff):

(1) The loan application was made by the defendants. The offer was made to the defendants. The resolutions sought by the plaintiff from the second third party and the Athmantha Guru Kulam. Those resolutions were to authorize the defendants to borrow and to undertake to repay all advances on demand. The fact that the plaintiff knew that the defendants were using the money for the third parties does not make the third parties their principals, and no such inference could justifiably be drawn since it was clear to all parties the third parties did not qualify to borrow directly from the plaintiff. The intention was very obvious that it was intended that the defendants would borrow from and repay to the plaintiff. (para 8)

(2) The argument that there was a collateral contract that the defendants would not be held liable for the loan was directly in contradiction with the agreement signed between the plaintiff and the defendants. Given that all parties knew that the plaintiff could not give loans to non-members, and that the third parties did not qualify for membership in the plaintiff, the alleged representation, even if true, amounted to representations in pursuance of an unlawful end. The alleged collateral contract therefore, even if it existed, was unlawful and could not protect the defendants from the operation of the agreements they had signed. (para 9)

(3) If an agent contracts in such a from as to render himself primarily liable to repay the loan, he could not afterwards, whether his principal was disclosed or not at the time of contract, relieve himself of his responsibility, even though as in this case the motivation may have been at least commendable.

A The submission that the third parties as principals were liable and the defendants as their agents were not, relying on s. 183 of the Contracts Act 1950 was therefore rejected. (para 12)

(4) Leave had been granted to the third parties to defend. B However, their case was to support the first and the second defendants and to confirm that they agreed to indemnify the first and second defendants in the event that they were held liable. There was nothing to stop the third parties from indemnifying the first and second defendants, but for the C indemnity to arise, the first and second defendants must remain liable. Though the first and second defendants may be said in common language to be 'agents' of the third parties, they were in law in respect of the loans, principals. If this inspired defence were accepted, it would open the floodgates D to protect borrowers from any liability by the simple device of pleading that they borrowed the money on behalf of another who was indigent who happily confirmed that he was indigent. (para 13)

E **(5)** The court did not accept the truth of the defence. There being no other defence, judgment was entered for the plaintiff against the first and second defendants as prayed, and the third parties were ordered to pay costs. No order was made for the third parties to pay the defendants for the reason that it would amount to the enforcement of an unlawful F arrangement. (para 14)

Case(s) referred to:

Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd [1993] 3 CLJ 344 SC ***(dist)***

G *Tan Swee Hoe Co Ltd v. AH Hussain Bros [1980] 2 MLJ 16* ***(refd)***

United Malayan Banking Corp Bhd v. Datuk Sri Chan Swee Ho & Ors [1978] MLJ 222 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 67

H Contracts Act 1950, s. 183

Other source(s) referred to:

Chitty on Contracts, 24th edn, para 674

For the plaintiff - SC Cheah (William Tan & Loo Kit Lim with him); M/s Lee Hishammuddin Allen & Gledhill

I *For the defendants - KF Yoong; M/s KF Yoong & Co*

For the 3rd parties - IN Jeganathan; M/s SK Yeoh & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail J:

[1] As submitted for the defendants, the plaintiff, The Co-Operative Central Bank Limited, is a co-operative society incorporated under the Co-Operative Societies Act 1948 and by a loan agreement dated 6 December 1984 ("loan agreement"), the plaintiff granted to the defendants a loan of RM500,000 ("loan"). The loan was granted to purchase shares in Ladang Christie Sdn. Bhd. ("Ladang Christie").

[2] Ladang Christie's land ("land") was charged to the plaintiff as security for the loan. The loan was disbursed. Ladang Christie's shares were never transferred to the defendants. The defendants have never made any repayment for the loan. The 1st third party, through another agent named Sarwan Khan bin Mohamed Khan ("Sarwan Khan"), applied to the plaintiff for and was granted a second loan of RM80,000, part of which was used to repay the outstanding interest on the loan. The defendants brought the third party proceedings claiming an indemnity from the third parties against the whole of plaintiff's claims and costs of this action. The 1st third party admitted that the defendants were his agents for the loan agreement and has agreed to indemnify the defendants should the defendants be held liable. Leave was given to the third parties to defend this action jointly with the defendants.

[3] After a full trial and hearing the parties on their written submissions, the court entered judgment against the defendants as per statement of claim on the amounts in the statement of accounts at pp. 424-430, costs; with costs against the third parties.

[4] Issues

(a) Whether the defendants entered into the loan agreement in their personal capacities or as 1st third party's agents?

(b) Whether the plaintiff entered into the loan agreement with the defendants in defendants' capacities as the third party's agents?

(c) Whether Nagalingam made the plaintiff's representations to the defendants prior to the defendants' execution of the loan agreement?

A (d) Whether the terms and conditions of the loan agreement are subject to the plaintiff's representations?

(e) Whether the plaintiff's representations amount to:

B (i) Misrepresentations; and/or

(ii) Fraud?

(f) Whether the loan agreement is void for illegality for:

C (i) Breach of the plaintiff's By-Laws; and/or

(ii) Breach of the Co-Operative Societies Act 1948; and/or

(iii) Breach of s. 67 of the Companies Act 1965?

D (iv) "In the event that there is some illegality, whether the amount received may be kept by the recipient or ought to be returned, that is, the original amount and not so much the income, interest or whatever."

[5] The third parties submit that the plaintiff admits that at all E material times, the plaintiff knew that the 1st third party wanted the loan, and neither third party was entitled to apply for the loan as neither was eligible for membership of the plaintiff. The plaintiff represented to the 1st third party, that the 1st third party could nominate persons eligible for membership of the plaintiff to apply F for the loan for the 1st third party's benefit. The plaintiff knew that the defendants were borrowing the loan wholly for the use of the 1st third party. Plaintiff approved the loan to the defendants wholly for the use of the 1st third party. The defendants were not getting any financial benefit from the loan. G The defendants were only obtaining a social or moral benefit, in that they were assisting the 1st third party to do a good thing.

[6] The plaintiff denies that the plaintiff, through its Chief Executive Officer, Mr. Mathimugam and Assistant General H Manager, Mr. Nagalingam, *inter alia*, represented to the 1st third party, that the defendants would not be liable for the loan and that the 1st third party would be liable for the loan. The plaintiff denies that any of its officers acting in the course of their duties did conspire to defraud the 1st third party. The plaintiff submits I that the Act does not forbid loans to member for exclusive use of a non-member.

[7] I do not think it is necessary to deal with the issues set out by the defendants *ad seriatim*. It is clear that the Act and the articles of the plaintiff do not restrict that a member can seek a loan from the cooperative bank, except that loans can be granted only to members. The loan could not possibly be granted to the third parties since they do not qualify as members. Whether the third parties were told they could nominate others such as the defendants who qualify to be members to take a loan and that such members would not be liable and only the third parties would be liable is irrelevant since the equitable principle of estoppel cannot be applied to obtain a result that would in effect be contrary to and emasculate the Act and the articles of the plaintiff.

[8] The documents cannot be read therefore, as suggested in the submissions for the defendants, but must be read in their ordinary meaning and context, as a loan to the defendants. The loan application was made by the defendants. The offer was made to the defendants. The resolutions sought by the plaintiff from the 2nd third party and the Athmantha Guru Kulam. Those resolutions were to authorise the defendants to borrow and to undertake to repay all advances on demand. The fact the plaintiff knew that the defendants were using the money for the third parties does not make the third parties their principals, and no such inference can justifiably be drawn since it was clear to all parties the third parties did not qualify to borrow directly from the plaintiff. The intention is very obvious then it was intended that the defendants would borrow from and repay to the plaintiff.

[9] The argument that there is a collateral contract that the defendants would not be held liable for the loan, is directly in contradiction with the agreement signed between the plaintiff and the defendants. Given that all parties knew that the plaintiff could not give loans to non-members, and that the third parties did not qualify for membership in the plaintiff, the alleged representation, even if true, amounts to representations in pursuance of an unlawful end, either of cheating the plaintiff if the sum cannot be recovered or effectively giving a loan to a non-member who could not qualify as a member, and cannot therefore be the basis of any lawful contract. The alleged collateral contract therefore, even if it existed, is unlawful, and cannot protect the defendants from the operation of the agreements they had signed.

[10] There is no other probative evidence of other grounds adduced that the defendants would not have applied for and accepted the offer of the loan and executed the loan agreement but for the representation: see Federal Court in *Tan Swee Hoe Co Ltd v. A. H. Hussain Bros.* [1980] 2 MLJ 16 @ 18 referring to *Chitty on Contracts* (24th edn) at para. 674, as would justify why the defendants should not be bound by the agreement they signed with the plaintiff.

[11] The following in *United Malayan Banking Corp. Bhd. v. Datuk Sri Chan Swee Ho & Ors* [1978] MLJ 222 in the Federal Court summarises the finding of this court:

> But on the basis that there was this underwriting in the circumstances as alleged by the respondent, the defence to our mind and with respect, is no defence as against the appellants. If as he claimed he was a nominee of this Kang Kok Seng, but in the borrowing of money from the bank, he was contracting in his own name as principal, he was nevertheless liable personally. Thus in *Mootiah Chitty v. Palaniappa Chitty* a chitty who signed a deed with his own name even though it was preceded by the mark of the firm for which he acted, was held personally liable under the deed. In the case of a promissory note, see *Kavena Said Meydin v. Kamarappu. Chatty*. See also the recent decision of the Federal Court in *Ching Yuen Tung v. Bep Aketik*.

[12] If an agent contracts in such a form as to render himself primarily liable to repay the loan, he cannot afterwards, whether his principal is disclosed or not at the time of the contract, relieve himself of his responsibility, even though as in this case the motivation may have been at least commendable. *Medicon Plastic Industries Sdn. Bhd. v. Syarikat Cosa Sdn. Bhd.* [1993] 3 CLJ 344 SC is clearly distinguishable on the facts. The submission that the third parties as principals are liable and the defendants as their agents are not, relying on s. 183 of the Contracts Act 1950 is therefore rejected.

[13] Leave had been granted to the third parties to defend. However, their case was to support the 1st and the 2nd defendants and to confirm that they agreed to indemnify the 1st and 2nd defendants in the event that they were held liable. There is nothing to stop the third parties from indemnifying the 1st and 2nd defendants, but for the indemnity to arise, the 1st and the 2nd defendants must remain liable. Though the 1st and the 2nd defendants may be said in common language to be “agents” of the

third parties, they are in law in respect of the loan, principals. If this inspired defence were accepted, it would open the floodgates to protect borrowers from any liability by the simple device of pleading that they borrowed the money on behalf of another who is indigent who happily confirms he is indigent.

[14] In all the circumstances, and on the evidence before me, I do not accept the truth of the defence, and even if it were true, the defence itself is not acceptable for reasons set out earlier above. There being no other defence, judgment is entered for the plaintiff against the 1st and 2nd defendants as prayed, and the third parties were ordered to pay costs. No order is made for the third parties to pay the defendants for the reason that it would amount to the enforcement of an unlawful arrangement.